a limited title, can grant no more than it has. If the ownership of the state is not complete, the courts mean either that entire dominion is impossible in the nature of things, or that the ownership though full is divided between the state and the public. But surely there is nothing in the nature of things to prevent the state or a private individual from holding as complete a fee in land under navigable waters as they may in any realty. The second alternative must be their real meaning. Yet merely to establish a rule of property law does not check the legislature, for the latter body may change rules of property subject to constitutional restrictions. Consequently to set a so-called rule of property law in the teeth of legislative act not constitutionally prohibited is to impose on the law-making body a court-made constitutional limitation, protecting public property in a way analogous to that in which private property is protected by the Fourteenth Amendment. That such constitution-making is quite unjustified does not need argument; that it is inexpedient is only the less clear. For it would seem that the administration of the natural highways of commerce is a matter best left in the hands of the legislature, composed of the representatives of the public whose rights are in question. Control of these agents is the proper means of securing the most beneficial disposition, from the public's point of view, of the natural highways of intercourse. Whether one public use should yield to another, or whether private ownership should be restored, are hardly justiciable questions.

The courts even in the jurisdictions supporting the trust doctrine should be slow to find that the legislature has exceeded its powers; for the determination of what is a public purpose is clearly one for the legislative branch of the government on considerations of time, place, and circumstances. The question before the court is identical with that which arises under the Fourteenth Amendment when the legislature is dealing with the power of eminent domain. The courts should act only if it is clear that the legislatures have acted unreasonably.[9]

EQUITABLE RELIEF AGAINST INJURIOUS FALSEHOODS. — A recent case presents in an interesting form the old problem as to the possibility of equitable relief against injurious falsehoods. *Howell* v. *Bee Publishing Co.*, 158 N. W. 358 (Neb.). At an early stage in the gubernatorial campaign the plaintiff had made public a statement declining to be a candidate for office and giving his reasons. Subsequently, however, he became an active aspirant for the Republican nomination. On the day before the primary election, the defendants, a daily newspaper of wide circulation, published the plaintiff's former declination under the headlines: "HOWELL WILL NOT RUN. HIS ANNOUNCEMENT EXPLAINING WHY HIS FRIENDS SHOULD NOT CAST THEIR VOTES FOR HIM." The Supreme Court reversed and dismissed the order of the District Court granting an interlocutory injunction. The majority opinion is rested squarely on

in speaking of the title to lands under navigable waters: "But it is a title different in character from that which the State holds in lands intended for sale."

[9] See the dissenting opinion in Matter of Long Sault Development Co., 212 N. Y. 1, 24, 105 N. E. 849, 856.

the constitutional provision guaranteeing "freedom of the press" and specifying that "truth " and "good motives" shall be a defense in all trials for libel.[1]

The publication in the present case appears to have amounted to a deliberate falsehood, without justification. It is, therefore, somewhat difficult to see the bearing of the second clause of this provision, upon which, however, no less than upon the first, the court expressly relies.[2] Even if the clause be taken as a guarantee of trial by jury in all cases analogous to defamation, its application to a case in which exist no issues of fact or inference for a jury would seem unwarrantable. For the rest, no authorities are cited, a rapid survey of the history of governmental censorship apparently leading the court to the conclusion, despite a *dictum* to the contrary, that "freedom of the press" means the absolute and inalienable right to speak, print, and disseminate libels and lies, provided one is willing, subsequently, to pay for the privilege.[3]

In a previous number of this REVIEW Dean Pound has discussed at length the effect upon equity jurisdiction of such guarantees of free speech and trial by jury.[4] He points out that that interpretation of "freedom of the press" which the court here adopts, though advocated by Blackstone [5] and embodied in certain decisions,[6] is, nevertheless, open to severe criticism. It is far too sweeping and conflicts with many well-established decisions.[7] Any narrower interpretation, however, would fail to support the principal case. Here is involved no right of the defendant freely to publish his own ideas and opinions; the right contended for is that of republishing the composition of another, with a single, deliberately false statement of fact — in substance that the plaintiff was no longer a candidate — appended. Moreover, "absolute rights" are a slippery foundation upon which to base a sound opinion; freedom of any sort must inevitably be limited somewhere by the rights of others; and in incorporating in a Bill of Rights, for their better protection, the more cherished common law immunities and privileges, there was no intention of disregarding these necessary limitations.[8] Cooley's interpretation of "free-

[1] NEB. CONST., Art. I, § 5. "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defence."

[2] In his "concurring" opinion, Sedgwick, J., says: "The opinion does not . . . say why the fact that it is a defence in an action for libel to prove that the publication was for good motives and for justifiable ends should prevent a court of equity from interfering."

[3] The syllabus, which by statute in Nebraska is written by the judge who voices the majority opinion, recites that "the publication of political matter in a newspaper cannot be enjoined merely because it is false or misleading, such relief being forbidden by . . . constitutional provisions."

[4] See Dean Pound, "Equitable Relief against Defamation," 29 HARV. L. REV. 640, 648–68.

[5] 4 BL. COMM., 152.

[6] The most important is Brandreth *v.* Lance, 8 Paige (N. Y.) 24.

[7] The position that the constitutional provision prohibits previous restraint in all cases of tortious writing or speaking would preclude relief in many cases where equity, however, will enjoin publications which it conceives are incidental to the attempted infringement of contracts or property rights. See the leading case of Gee *v.* Pritchard, 2 Swanst. 402; and also 4 POMEROY, EQ. JUR., 3 ed., § 1353, and cases there cited.

[8] As Sedgwick, J., in his concurring opinion puts it: "the constitution itself pro-

dom of the press" as freedom from administrative and legislative censorship only,[9] would seem most in accord with history, logic, common sense, and the authorities in general.[10] So construed it would leave unimpaired the general rules of law; and, in the absence of need for trial by jury, equity should be as free to exercise concurrent jurisdiction here as in any other branch of the law of torts. This is the conclusion which Dean Pound reaches on principle;[11] and it is supported by modern English authority.[12]

If it be conceded, then, that reason discloses in a case like the present no fatal obstacle to equitable relief, the further question yet remains: Is there in this specific instance any tort, actual or threatened, upon which to base such concurrent jurisdiction? That the intentional infliction of injury, without justification, invariably constitutes a tort may or may not be settled law. But when the means employed are, as here, fraudulent, that is, in themselves illegal, the law is clear. Provided that the damage inflicted amount to "legal harm," the injured party may recover in tort.[13] What legal harm, if any, then, has the present plaintiff suffered? Two possibilities suggest themselves.[14] The immediate result of the

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vides that those who publish are 'responsible for the abuse of that liberty'; and it is the abuse of the liberty that is enjoined and not the liberty itself." See also the remarks of Brown, J., in Robertson *v.* Baldwin, 165 U. S. 275; quoted in 29 HARV. L. REV. 652, n. 29.

[9] COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 605. He defines "freedom of the press" as "complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character when judged by such standards as the law affords."

[10] See *supra*, n. 7; also *infra*, n. 12.

[11] See 29 HARV. L. REV. 655, 668. Perhaps an added reason may be found in the more than usual difficulty of assessing money damages in the class of cases under discussion.

[12] Liverpool Ass'n. *v.* Smith, 37 Ch. Div. 170; Collard *v.* Marshall, [1892] 1 Ch. 571; James *v.* James, 13 Eq. 421. The American courts, affected no doubt by Puritanism's distrust of equity, have only recently begun to exercise a concurrent jurisdiction over legal injuries through publication; and that indirectly by viewing such injuries as incidental to unlawful intimidation, boycotts, or extortion. For the earlier authorities, see Boston Diatite Co. *v.* Florence Mfg. Co., 114 Mass. 69, and the cases cited in Dean Pound's article, 29 HARV. L. REV. 661, n. 60. For examples of the modern tendency, see *ibid.*, 29 HARV. L. REV. 655, n. 41; 666, n. 78; and 667, notes 80, 82, and 83.

[13] Ratcliffe *v.* Evans, [1892] 2 Q. B. 524. This case bears an interesting analogy to the principal case in that the defendant newspaper was held liable for publishing a statement that the plaintiff had ceased to carry on business, knowing this to be untrue. Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74. The cases are collected in 1 AMES, CASES ON TORTS, 3 ed., 693 *et seq.*

[14] A third possibility might be added to these because of a certain historical interest. In Gee *v.* Pritchard, 2 Swanst. 402, Lord Eldon held that the writer of purely personal letters, apparently of no literary value, to whom the actual written pages had been returned, had, nevertheless, a sufficient "property right" to enable equity to enjoin the publication of copies which had been retained by the defendant. It might be urged on an attempted analogy with this famous old case that in the present case a property right of the plaintiff's had been violated by the unauthorized publication of his written statement. Such a contention seems untenable because of plaintiff's own prior publication of his statement to the world. However, it is not without interest. It calls attention to the somewhat metaphysical basis upon which the then unrecognized right of privacy was protected in the "parent" case of this entire branch of our law. It also not unnaturally suggests the thought that relatively very little more creative fancy would be required of a twentieth century Lord Eldon to find in the case before us the infringement of some emaciated but "technical" right of property.

defendant's act was the violation of the plaintiff's right to be freely voted on by his fellow citizens. But such a right is primarily political, not civil; it is enjoyed by enfranchised citizens only, not by all men equally. Its infringement, therefore, falls short of the civil "legal harm" now sought for.[15] Moreover, the practical difficulties in the way of any general interference by equity in local primaries support the view taken by the cases, that remedies other than equitable injunction must be looked to for the redress of such a wrong.[16] A loss, however, to constitute "legal harm" need not be of something to which plaintiff was already legally entitled,[17] nor which was even certain, otherwise, to have accrued to him.[18] Why then is not the plaintiff's chance of election to public office, like any salaried business position, a probable pecuniary expectancy,[19]— a right of substance? In analogous tort cases the damage need only be proved with such particularity as the circumstances allow;[20] and reason would suggest that a suit in equity might well be maintained in a case like the present, where grave injury, for which damages would be inadequate redress, was clearly and imminently threatened. The answer may well be that such a contention, however much in accord with the actual facts of politics under a spoils system, is too far removed from the common law notion of the nature of office-holding to be maintainable in a court of law.[21] But even so, such an office of trust and honor might well be considered a social relation of profit and value, quite apart from the salary entailed. If so, it is as worthy of equity's protection as, let us say, the domestic relation, where value, likewise, cannot be computed in terms of dollars and cents.

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[15] Fletcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683; Kearns *v.* Howley, 188 Pa. 116, 41 Atl. 273. As to the converse political right to cast one's vote unhindered, its violation would seem, curiously enough, to be recognized as civil legal harm. At least this is true when the violation is intentional and in bad faith and when the plaintiff is wronged as an individual and not merely in common with the general public. Ashby *v.* White, 2 Ld. Raym. 938; Lincoln *v.* Hapgood, 11 Mass. 350; 2 COOLEY, TORTS, 3 ed., 626, 801.

[16] Fletcher *v.* Tuttle, 151 Ill. 41, 37 N. E. 683, distinguishing the use in such connection of the ordinary injunction in equity from that of the prerogative writs of *mandamus* and *quo warranto*. Winnett *v.* Adams, 71 Neb. 817, 99 N. W. 681, in which the court declares that the voters themselves constitute the proper tribunal for the redress of this class of wrongs.

[17] Rice *v.* Manley, 66 N. Y. 82; Lewis *v.* Corbin, 195 Mass. 520, 8 N. E. 248.

[18] In Chaplin *v.* Hicks, [1911] 2 K. B. 786, the court held that the deprivation of one chance in four of winning a beauty contest was legal harm for which actual damages might be estimated and awarded. Note that neither the conjectural nature of plaintiff's probable expectancy nor the fact that it depended wholly upon the act of a third person, intrusted with the final selection, prevented its infringement from amounting to a complete wrong.

[19] This right is one form of what Terry calls the "right to unimpaired pecuniary condition." See TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, §§ 350–358. When the usurper of a public office is dispossessed by *quo warranto* or other suitable proceeding, the money value of the office is recognized and the rightful holder allowed to recover in damages the amount of the emoluments. 2 COOLEY, TORTS, 3 ed., 629, 630.

[20] The leading case is Ratcliffe *v.* Evans, referred to in n. 13, *supra*.

[21] MECHEM, PUBLIC OFFICES, § 241. Speaking of the common law the author says: "An office was regarded as a burden which the appointee was bound in the interest of the community and of good government to bear."

THE STATUS OF STATE MILITIA UNDER THE HAY BILL. — The United States Circuit Court of Appeals for the first circuit, reversing the District Court for the District of Massachusetts,[1] has held in a very recent opinion that a member of the Massachusetts militia who refuses to take the oath prescribed in the Hay Bill [2] is not relieved from federal obligations under the Dick Bill and its amendments.[3] *Sweetser* v. *Emerson* (not yet reported). The appellee, Emerson, contended that the Hay Bill provided for an organized militia consisting exclusively of a class designated National Guards; [4] that no one could be a member thereof without taking the federal oath; [5] that if he refused to take the oath, he could not be part of the organized militia, and so could not be required to do federal service under the terms of his existing contract.[6] In short, he argued that there was an implied repeal of the parts of the Dick Act requiring militiamen to perform such service without the oath.[7]

The law in general is not in favor of repeals by implication; if two measures are not so utterly inconsistent that they cannot stand together, both are enforced in the absence of an express provision to the contrary.[8] In addition, courts are even stricter when a repeal by implication would mean the relinquishing of a governmental power over any matter of public concern.[9] The construction of the appellee would require such a surrender, and the burden is on him of proving that there is an immediate repeal of the sections of the Dick Bill [10] supposed to conflict with the provisions of the Hay Bill.

The keystone of Emerson's argument is that the classification of the militia is an exclusive one and leaves no organized militia other than the National Guard. He cannot be a member of this force, as he has not taken the required oath, and so he says that he is not a part of the organized militia.[11] That this classification is not intended to be all-embracing is shown by other provisions of the Act. The army of the United States is to consist of certain named bodies, including the National Guard,

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[1] Emerson *v.* Sweetser. Opinion given 10 August, 1916.

[2] NATIONAL DEFENSE ACT OF 3 JUNE, 1916.

[3] See 32 STAT. AT LARGE, 776, and 35 STAT. AT LARGE, 400.

[4] See §§ 57, 58.

[5] See §§ 70, 71.

[6] See MASS. ACTS OF 1908, ch. 604, §§ 85, 86.

[7] The Hay Bill contains no express repeal of existing statutes; there is only a general clause, repealing all inconsistent measures. See § 128. Thus any repeal of other acts must be found solely by implication.

[8] See 1 SUTHERLAND, STATUTORY CONSTRUCTION, 2 ed., § 247; SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW, 2 ed., 97.

[9] See Proprietors of Charles River Bridge *v.* Proprietors of Warren Bridge, 11 Pet. (U. S.) 420, 547; Wheeling, etc. Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 293; Bird *v.* U. S., 187 U. S. 118, 124. "Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the government of a power which has been confided to it to be used for the general good — or which would enable individuals to embarrass it, in the discharge of the high duties it owes to the community — unless plain and express words indicated that such was the intention of the legislature." Chief Justice Taney, in Brown *v.* Duchesne, 19 How. (U. S.) 183, 195.

[10] The only contention was over the liability of the appellee under his existing contract; it was assumed that no new contracts may be made except under the terms of the Hay Bill. If there was no implied repeal, the appellee admitted his obligation to enter the service of the United States at the time he was called.

[11] See notes 4 and 5, *supra*.

and such other land forces as were authorized at the passage of the statute or might thereafter be authorized.[12] By the Dick Act the Massachusetts militia was one of those land forces authorized by law.[13] By another provision it is enacted that the section should not be construed to prevent any state from maintaining existing organizations if they would conform to such regulations as the President should prescribe.[14] At the passage of the Hay Bill there were no such regulations; so existing organizations would temporarily remain as they were. The Hay Bill further provides that if any state fails to comply with or enforce the requirements of the Act, the National Guard of such state shall receive no aid from the United States.[15] This seems to imply that a state may still have a National Guard that is not organized under the Act; true, it will not be recognized for purposes of federal aid, but it certainly does not follow that the United States will not enforce its rights to service from such body. Thus the Hay Bill assumes that organized militia may exist other than under its terms. Undoubtedly the ultimate aim of the policy expressed in the Hay Bill is the establishment of a standardized National Guard, and at the expiration of existing contracts, binding members to other forms of service, this object will be attained. But in the interim, the bill offers members of militia organizations the choice of becoming a part of the new body or of retaining their status under outstanding contracts, subject to all the obligations thereof.[16] Emerson, accordingly, was subject to federal service under his enlistment, signed in accordance with the terms of the Dick Act.[17]

Though not involved in the present decision the question arises as to the scope of authority over the National Guard conferred on the United States by the Hay Bill.[18] By the federal Constitution the power of Congress over the state militia is limited specifically to three purposes,[19]

[12] See § 1.

[13] See 32 STAT. AT LARGE, 775.

[14] See § 62.

[15] See § 116.

[16] It is clear that congressional debates may not be used as a means of construing a statute, though they may be resorted to as a means of ascertaining legislative environment at the time of enactment of a particular law. See Standard Oil Co. *v.* U. S., 221 U. S. 1, 50. Reports of congressional committees are to be given but little more respect in interpretation. See St. Louis, etc. R. Co. *v.* Craft, 237 U. S. 648, 661. There is small aid to be obtained from the Congressional Record in the construction of the Hay Bill. The debates are full of contradictions. See 53 CONG. RECORD 5294; 53 CONG. RECORD 5299. We have, accordingly, confined ourselves to the actual statute, and have found it sufficient to support the court's opinion.

[17] Section 61 of the Hay Bill provides that no state shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under that Act. Militia are not generally considered troops in the sense in which the word is used in the Constitution of the United States. See Dunne *v.* People, 94 Ill. 120, 138; State *v.* Wagener, 74 Minn. 518, 523; Smith *v.* Wanser, 68 N. J. L. 249, 258. There is no reason to believe that the word is used in any different sense in this bill. Accordingly this section would not forbid the continuance in service of men enlisted under the Dick Act.

"The courts have thus far refused to apply the term 'troops' to bodies of men who are armed and who leave their ordinary vocations only temporarily for the purpose of training for short periods as the militia have done in the past, and restrict the application of that term to men who have adopted the military profession more or less as their calling." Statement made by the Judge Advocate General of the United States Army.

[18] See 53 CONG. RECORD 4927.

[19] U. S. CONSTITUTION, Art. 1, par. 8, cl. 15 and 16.

yet the Act now under discussion provides that Congress may draft the National Guard into the service of the United States for any object requiring troops in excess of those of the regular army.[20] Escape from constitutional restrictions does not lie in a metamorphosis of the militia, for the National Guard is certainly to be militia.[21] There was no intent to abolish this form of state organization; to avoid such a result was a prime reason for jettisoning the Garrison plan for a volunteer army.[22] Though rendered more amenable to federal control and discipline, the National Guard remains a force enlisted and officered by the states, quartered within the states, and at the service of the states in time of peace.[23] That the federal government will pay the members of the National Guard does not militate against its militia character, for this provision is only to insure the availability of efficient state forces.[24] Moreover, granting that the Guard retains its local nature, it cannot be shorn thereof by a federal draft. Called into the United States Army as militia, it serves as such and is protected by constitutional guarantees. Therefore compatibility with constitutional restrictions must be found in a waiver by the militia of its right to be called on as such to serve the nation for only three specified purposes. It would appear that the states, by enlisting men under the authority of the bill and by accepting federal aid as therein provided, will waive their right to object to the action of Congress under the terms thereof — by action under the Act they have given their assent. As for the individuals, their enlistment oath binds them to serve under the conditions prescribed by law, to defend the United States against all enemies whomsoever, and to obey the orders of the President.[25] This would seem to constitute an express waiver of their constitutional right to object to a draft for other than the constitutionally specified purposes. Congress accomplishes this result by using its constitutional power to organize the militia to abolish the constitutional limitations placed on its use of the militia. A state is given

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[20] See §§ 101, 111.

[21] The National Guard is provided for under the title "The Militia." Names are not of great importance in general, but the term "militia" has an important constitutional history behind it, and it is to be presumed that Congress uses it with this historical connotation in mind. "Remember always that the great principle of the Constitution on that subject is that the militia is the militia of the States, and not of the general government, and being thus the militia of the States, there is no part of the Constitution worded with greater care and with a more scrupulous jealousy than that which grants and limits the power of Congress over it." 2 WEBSTER, WORKS, 95.

[22] See 53 CONG. RECORD 4951. It was stated by a member of the Senate Committee on Military Affairs that to adopt the Garrison scheme would be destructive of the National Guard. See 53 CONG. RECORD 4929. Chairman Hay of the House Committee declared that there was no attempt to legislate any organization whatever out of existence. See 53 CONG. RECORD 5299.

[23] See §§ 74, 75, where the qualifications of officers are set out, but no change in the authority from which they take their commission is made.

Sections 69, 70, and 71 make no change in the method of enlistment, though the contract is changed.

Section 68 gives states the right to determine and fix the location of the units of the National Guard within their respective borders.

Section 61 says that the Act does not limit the use of the National Guard by the states during time of peace.

[24] See 53 CONG. RECORD 4951.

[25] See §§ 70, 71.

the choice of having no militia or one unprotected by constitutional guarantees. The net result is that the old sort of militia, known to the Constitution, is to be done away with.

THE PROPOSED MODEL STATUTE ON INSANITY AND CRIMINAL RESPONSIBILITY. — The revolution of the social conception of insanity, together with the recognition that it is a disease rather than a bedevilment,[1] has led to a demand for more humane and scientific methods of dealing with insane offenders. Accordingly, the Institute of Criminal Law and Criminology, at last summer's meeting, approved a model statute intended to define criminal responsibility in its relation to insanity with a view of substituting for the rule of *M'Naghten's Case*[2] a test more in accord with contemporary theories. Section 1, the gist of the proposed statute, provides that "No person hereafter shall be convicted of any criminal charge, when at the time of the act or omission alleged against him, he was suffering from mental disease and did not have by reason of such disease the particular state of mind which must accompany such act or omission in order to constitute the crime charged." The test thus laid down is open to numerous objections. It neglects entirely the important and steadily growing class of crimes in which a specific intent is unnecessary. Under the statute those who have a mania for purchasing lottery tickets, for dispensing liquors to minors, or for frequenting gambling dens and brothels would be unable to plead insanity and would apparently be sent to prison instead of to an insane asylum. Nor would the statute cover statutory rape committed by insane offenders. Inasmuch as the criminal law of the future will be greatly concerned with cases in which a particular state of mind is unimportant, the statute is not comprehensive enough for a model act.

It is difficult to see wherein the proposed legislation would materially change the existing legal stituation.[3] The section adequately states the

[1] The supernatural view of insanity persisted as late as 1862. In State *v.* Brandon, 8 Jones (N. C.) 463, the court said: "The law does not recognize any moral power compelling one to do what he knows is wrong. 'To know the right and still the wrong pursue' proceeds from a perverse will brought about by the seductions of the evil one. . . . If the prisoner knew that what he did was wrong, the law presumes that he had the power to resist it against all supernatural agencies." In the same year (1862) the Lord Chancellor of England declared in the House of Lords that "the introduction of medical theories into the subject has proceeded on the vicious principle of considering insanity as a disease." HANSARD, DEBATES, 1st series, clxv, 1297.

[2] 10 Cl. & Fin. 200.

[3] At present the states may be divided into three groups. The first is composed of those in which the rule of M'Naghten's Case has been adopted as the complete statement of the law. This is true in the federal as well as in the following state courts: Ark., Cal., Del., Id., La., Me., Minn., Miss., Mo., Neb., N. J., Nev., N. Y., N. C., Okla., Ore., S. D., Tenn., Va., Wis., Ga. (but see Flanagan *v.* State, 103 Ga. 619) and Tex. (but see Harris *v.* State, 18 Tex. Cr. App. 287). Wrong is in many cases understood to mean morally wrong. U. S. *v.* Guiteau, 10 Fed. 161; People *v.* Schmidt, 216 N. Y. 324. See 29 HARV. L. REV. 538.

In the second group the effect of insanity on the emotions and will is recognized and the so-called irresistible impulse test is added to the knowledge test. This test was first used by Chief Justice Shaw in Commonwealth *v.* Rogers, 7 Metc. (Mass.) 500, and by Chief Justice Gibson in Commonwealth *v.* Mosler, 4 Barr (Pa.) 266. It has been followed in Conn., Ia., Ky., Mont., and Ohio.

The third group leaves it all to the jury whether, as a matter of fact, responsibility